

K. STEVEN ROBERTS

**ATTORNEY AT LAW
641 FIFTH AVENUE, 29TH FLOOR
NEW YORK, NY 10022**

**PHONE (212) 935-9111
FAX (212) 935-1854**

August 30, 1996

via facsimile 717-338-2689

Page 1 of 3

Terry Fishel, Chief
Wireless Telecommunications Bureau, Land Mobile Branch
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

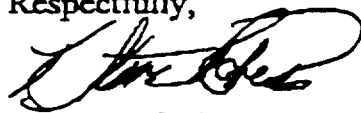
Dear Terry:

I write in follow-up to our telephone conversation last week regarding the status of the Showing of my clients for an extended period of time to construct. In that conversation, you were most helpful in guiding my efforts to assist the Land Mobile Branch in this matter. Taking your advice, I have contacted my co-counsel, Paul C. Besozzi, and requested that he contact David Furth to seek procedural guidance on granting the relief sought by the Showing.

My communication to Paul was in the form of a two-page memorandum which detailed the factual background and the conversations I had last week with you and Michael. As I referenced both your names and your conversations with me, I believe that you should receive a copy of my memorandum for your reference and therefore attach same to this letter. Please share the memorandum with Michael. If the memorandum contains information that either of you do not believe is factually correct, please advise me so that I can promptly correct same. I greatly respect both you and Michael and am deeply appreciative of the assistance you have provided to me and my clients since 1993 on this matter. I am hopeful that Paul's contact to David will provide the requested and needed guidance. I will keep you apprised of any feedback from the contact.

Thank you again for your efforts. Please contact me if I can be of further assistance.

Respectfully,



K. Steven Roberts

Attachment

MEMORANDUM

DATE: August 28, 1996

TO: Paul C. Besozzi, Esq.

FROM: K. Steven Roberts, Esq.

SUBJECT: Rejustification of Extended Implementation

On behalf of my clients, I write this memorandum shall serve to document that status of their efforts to rejustify their existing grant of extended implementation. Attached hereto is a three-page letter dated June 24, 1996, addressed to Michael J. Regiec, Deputy Chief, Land Mobile Branch, Wireless Telecommunications Bureau (the "Bureau"), which is incorporated herein by reference. This letter sets forth the procedural facts relating to the Showing which was submitted to the Bureau in early June 1996. Last week, I had telephone conversations with both Michael Regiec and with Terry Fishel of the Bureau regarding the status of the Bureau's review of the Showing. This memorandum shall serve to document those conversations and my recommendations.

August 21, 1996, Telephone Conversation with Michael J. Regiec

Michael stated that he had completed his review of the Showing and had determined that the Showing fully satisfied the requirements of Section 90.629(e). Michael advised me that he had prepared a letter of approval and had delivered same to Terry Fishel for further disposition.

August 22, 1996, Telephone Conversation with Terry Fishel

Terry acknowledged possession of the Showing and the approval of Michael. However, Terry stated that certain of the other showings have requested an extended period of time greater than two years. Terry perceives that a grant of additional time beyond two years would impact the mechanics of the announced and upcoming auction of 800 MHz SMR frequencies and thereby requires further analysis before approvals can be granted to these other showings. Terry acknowledged that the Showing of my clients is not included in this category of showings but has no instruction from the Bureau to treat the various showings separately rather than as one entire group. Terry suggested that I assist him in highlighting this issue and the need of the Land Mobile Branch to be able to distinguish showings requesting the statutory relief of two years provided by Section 90.629(e) and the showings requesting greater relief.

Terry stated that the Land Mobile Branch has requested and is awaiting instruction from the Bureau as to the procedures for granting approvals for those showings which satisfy Section 90.629(e). Terry stated that the Showing of my clients:

- was the first to be filed,
-
- has already been reviewed and approved by the Land Mobile Branch, and
-
- only seeks the statutory relief of 2 years set forth in Section 90.629(e);

accordingly, Terry suggested that I contact David Furth of the Bureau and request his assistance in facilitating a prompt response to the request of the Land Mobile Branch for procedures for granting approval of those showings, such as the Showing of my clients, which are in strict compliance with the requirements of Section 90.629(e) and request only the two years of relief set forth therein. Terry further stated that once such response is provided by the Bureau, approval would be immediately granted to the Showing of my clients.

The urgency of my efforts to facilitate the Bureau's approval of the Showing is prompted by the business realities. As you are aware, the super-majority of the licenses granted to my clients were mailed in mid-May 1996. Immediately thereafter the Showing was prepared in strict compliance with the requirements of Section 90.629(e) and was the first to be filed with the Bureau. Since then, on behalf of my clients, I have been aggressive in my efforts to negotiate the requisite vendor and other financing to enable the construction of the base stations comprising the wide-area system of my clients which has already been approved by the Bureau. I am now pleased to inform you that two sources of financing, one being Motorola for base station equipment, have agreed to terms; however, the impediment to finalizing both sources of said financing is the uncertainty caused by not yet receiving the grant of approval of the Showing. As a result, the construction and implementation efforts of my clients are suspended awaiting the approval action of the Bureau.

In light of the foregoing, I recommend that you contact David Furth of the Bureau, inform him of the issue, and seek his prompt assistance. The Bureau, my clients, and the interests of the public would be well served by any assistance he could offer. The issue is really only a matter of internal guidelines to enable the Land Mobile Branch to administer the statutory relief set forth in Section 90.629(e). If you deem it appropriate, you may share the contents of this memorandum and attachment with David Furth. Time is of the essence. Thanks.

***** -COMM.JOUR

***** DATE AUG -1996 ***** TIME 08:31 ***** P.01

MODE = TRANSMISSION

START=AUG-30 08:30

END=AUG-30 08:31

NO. COM ABBR/NTWK

STATION NAME/
TELEPHONE NO.

PAGES

PRG.NO.

PROGRAM NAME

001

OK 2

17173382689

003

***** (FAX-950

U1.24)*****

2129351054*****

PATTON BOGGS, L.L.P.
2550 M STREET, N.W.
WASHINGTON, D.C. 20037-1350
(202) 457-6000
FACSIMILE: (202) 457-6315

WRITER'S DIRECT DIAL

(202) 457-5292

August 29, 1996

BY HAND DELIVERY

Mr. David Furth
Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Room 7002, Stop Code 2000C
2025 M Street, N.W.
Washington, D.C. 20554

Re: **Extended Implementation Authority**
Rejustification - 800 MHz SMR

Dear David:

I am writing this at the suggestion of David Kirschner, with whom I discussed the issue in your absence. The communication also derives from the suggestion of the Land Mobile Branch in Gettysburg, as the attached memo reflects.

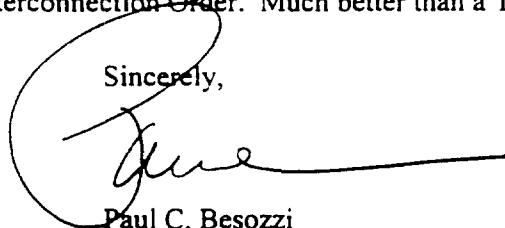
Basically, the recipients of a previously-granted extended implementation authority, who have satisfied the requirements for rejustification and are asking for no more than the minimum the new rule allows, need the approval that the Land Mobile Branch is prepared to give. However, as I read it, the Land Mobile Branch needs the Bureau's blessing to proceed. I understand that in part there may be issues of others, who want more than the two years, that are holding things up.

My clients have adhered religiously to the Commission's process regarding rejustification. The request fits squarely within the Commission's rules. They are, as reported in the attached memorandum, on the verge of completing a vendor financing package which will get this three year project off the drawing board and be of great service to the public. They should not be delayed because others apparently want special treatment, outside the two-year limit.

I would hope, and request, prompt provision of what ever Bureau guidance the Land Mobile Branch needs to favorably dispose of this request. I will call you next week to follow up on this matter.

I hope that your absence this week was a well-deserved vacation. I spent parts of mine reading some of your recent handiwork -- the Interconnection Order. Much better than a Tom Clancy novel.

Sincerely,



Paul C. Besozzi

MEMORANDUM

DATE: August 28, 1996

TO: Paul C. Besozzi, Esq.

FROM: K. Steven Roberts, Esq.

SUBJECT: Rejustification of Extended Implementation

On behalf of my clients, I write this memorandum shall serve to document that status of their efforts to rejustify their existing grant of extended implementation. Attached hereto is a three-page letter dated June 24, 1996, addressed to Michael J. Regiec, Deputy Chief, Land Mobile Branch, Wireless Telecommunications Bureau (the "Bureau"), which is incorporated herein by reference. This letter sets forth the procedural facts relating to the Showing which was submitted to the Bureau in early June 1996. Last week, I had telephone conversations with both Michael Regiec and with Terry Fishel of the Bureau regarding the status of the Bureau's review of the Showing. This memorandum shall serve to document those conversations and my recommendations.

August 21, 1996, Telephone Conversation with Michael J. Regiec

Michael stated that he had completed his review of the Showing and had determined that the Showing fully satisfied the requirements of Section 90.629(e). Michael advised me that he had prepared a letter of approval and had delivered same to Terry Fishel for further disposition.

August 22, 1996, Telephone Conversation with Terry Fishel

Terry acknowledged possession of the Showing and the approval of Michael. However, Terry stated that certain of the other showings have requested an extended period of time greater than two years. Terry perceives that a grant of additional time beyond two years would impact the mechanics of the announced and upcoming auction of 800 MHz SMR frequencies and thereby requires further analysis before approvals can be granted to these other showings. Terry acknowledged that the Showing of my clients is not included in this category of showings but has no instruction from the Bureau to treat the various showings separately rather than as one entire group. Terry suggested that I assist him in highlighting this issue and the need of the Land Mobile Branch to be able to distinguish showings requesting the statutory relief of two years provided by Section 90.629(e) and the showings requesting greater relief.

Terry stated that the Land Mobile Branch has requested and is awaiting instruction from the Bureau as to the procedures for granting approvals for those showings which satisfy Section 90.629(e). Terry stated that the Showing of my clients:

- was the first to be filed,
-
- has already been reviewed and approved by the Land Mobile Branch, and
-
- only seeks the statutory relief of 2 years set forth in Section 90.629(e);

accordingly, Terry suggested that I contact David Furth of the Bureau and request his assistance in facilitating a prompt response to the request of the Land Mobile Branch for procedures for granting approval of those showings, such as the Showing of my clients, which are in strict compliance with the requirements of Section 90.629(e) and request only the two years of relief set forth therein. Terry further stated that once such response is provided by the Bureau, approval would be immediately granted to the Showing of my clients.

The urgency of my efforts to facilitate the Bureau's approval of the Showing is prompted by the business realities. As you are aware, the super-majority of the licenses granted to my clients were mailed in mid-May 1996. Immediately thereafter the Showing was prepared in strict compliance with the requirements of Section 90.629(e) and was the first to be filed with the Bureau. Since then, on behalf of my clients, I have been aggressive in my efforts to negotiate the requisite vendor and other financing to enable the construction of the base stations comprising the wide-area system of my clients which has already been approved by the Bureau. I am now pleased to inform you that two sources of financing, one being Motorola for base station equipment, have agreed to terms; however, the impediment to finalizing both sources of said financing is the uncertainty caused by not yet receiving the grant of approval of the Showing. As a result, the construction and implementation efforts of my clients are suspended awaiting the approval action of the Bureau.

In light of the foregoing, I recommend that you contact David Furth of the Bureau, inform him of the issue, and seek his prompt assistance. The Bureau, my clients, and the interests of the public would be well served by any assistance he could offer. The issue is really only a matter of internal guidelines to enable the Land Mobile Branch to administer the statutory relief set forth in Section 90.629(e). If you deem it appropriate, you may share the contents of this memorandum and attachment with David Furth. Time is of the essence. Thanks.

K. STEVEN ROBERTS

**ATTORNEY AT LAW
641 FIFTH AVENUE, 29TH FLOOR
NEW YORK, NY 10022**

**PHONE (212) 935-9111
FAX (212) 935-1054**

June 24, 1996

via facsimile 717-338-2689

Page 1 of 3

Michael J. Regiec, Deputy Chief
Wireless Telecommunications Bureau, Land Mobile Branch
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Dear Mike:

On June 4, 1996, on behalf of the Licensees set forth on Exhibit A hereto, I delivered to you the Extended Implementation Authority Showing under Section 90.629(e) of the Commission's Rules (the "Showing"). Later that same day, the Wireless Telecommunications Bureau (the "Bureau") issued a Public Notice which outlined the information to be provided by 800 MHz SMR licensees seeking to retain extended implementation authority. In immediate response thereto, on June 12, 1996, I caused the delivery to you of a Supplement to Extended Implementation Authority Showing (the "Supplement"). Then, on June 13, 1996, the Bureau released an Order which extended the deadline for filing extended implementation rejustifications from June 17 to July 15, 1996 (the "Order").

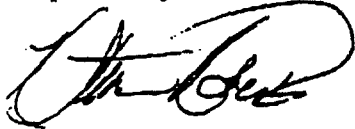
On behalf of the Licensees, I now write to prompt a review of the Showing and Supplement (hereinafter, collectively referred to as the "Showing"). In the Order, the Bureau stated that "the public interest would be served by granting an extension of time to enable licensees to compile the information requested by the Rejustification Public Notice" but also stated that "Nevertheless, this extension of time to file will not affect the timing or duration of any extended implementation grant that may be granted by the Bureau." Of concern to the Licensees is the possibility that the extended deadline for filing rejustifications might serve to delay the review of the timely-filed Showing. As the Order clearly states, "this extension of time to file will not affect . . . the duration of any extended implementation grant". Accordingly, any delay by the Bureau in review of the Showing would only serve to unreasonably prejudice the Licensees. The Licensees did not require an extension of time to file the Showing. Accordingly, in light of the timely filing of the Showing by the Licensees, equity requires, and the Licensees respectfully request, that the Bureau review the Showing and promptly grant the relief sought therein.

June 24, 1996

Page 2

As always, thank you for your attention and assistance. Please call me if you have any questions. I look forward to your response.

Respectfully,

A handwritten signature in black ink, appearing to read "K. Steven Roberts". The signature is fluid and cursive, with a large loop at the end.

K. Steven Roberts

Attachment

EXHIBIT A

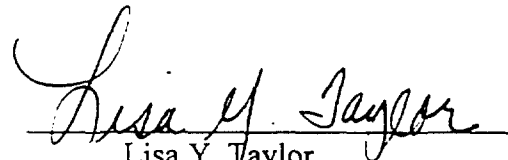
LIST OF LICENSEES

Harrowby TV, Inc.
USITV, Inc.
MTI TV, Inc.
Ooh Baby! Productions, Inc.
Ashcroft ITV, Inc.
Italia TV, Inc.
O'Neil TV, Inc.
HGTV, Inc.
SGTV, Inc.
RMTV, Inc.
JMTV, Inc.
Joan Moore, Inc.
Elizabeth Martone, Inc.
Bill Roberts, Inc.
Mary Francis Martone, Inc.
Shelly Curtright, Inc.
Maureen Widing, Inc.
Dru Jenkinson, Inc.
Joseph Martone, Inc.
Jana Green, Inc.
Kathy Recos, Inc.
Jeff Roberts, Inc.
Patricia Fleming, Inc.
Tad Dobbs, Inc.
Wes Dalton, Inc.
Steve Dowdy, Inc.
David X. Crossed, Inc.
Scott Mayer, Inc.
Hunter ITV, Inc.
Tenth Street TV, Inc.
BBTV, Inc.
JBTV, Inc.
Lynn Adams, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 1997, I have caused to be served a true and correct copy of the foregoing "**PETITION FOR PARTIAL RECONSIDERATION BY ROBERTS LICENSEES**" by hand delivery to the following individual:

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W., Room 808
Washington, D.C. 20554



Lisa Y. Taylor

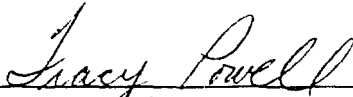
CERTIFICATE OF SERVICE

I, Tracy Powell, a secretary in the law firm of Patton Boggs, L.L.P., do hereby certify that a copy of the foregoing "**EXPEDITED PETITION FOR TOLLING OF CONSTRUCTION DEADLINE OF ROBERTS LICENSEES**" has been hand delivered this 8th day of August, 1997 to the following:

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, NW, Room 808
Washington, DC 20554

David Furth, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554



Tracy Powell

Before the
Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL **RECEIVED**

AUG - 8 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

Implementation of Sections 3(n) and 332)
of the Communications Act)
Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

**EXPEDITED PETITION FOR TOLLING OF CONSTRUCTION
DEADLINE OF ROBERTS LICENSEES**

ROBERTS LICENSEES

Paul C. Besozzi
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5292

Dated: August 8, 1997

TABLE OF CONTENTS

	Page No.
SUMMARY	ii
I. The Commission's Standards For Grant Of A Stay Are Clear And Well Established And Compel A Tolling Of The Construction Period Pending Action On The Petition For Reconsideration	3
II. The Roberts Licensees Have Been Subjected To Shifting Standards On The Issue Of Their EIA	4
III. The Roberts Licensees Have Demonstrated That They Will Succeed On The Merits Of Their Petition For Reconsideration	7
A. Imposition Of Different Standards Without Prior Notice To Drastically Reduce The Roberts Licensees Construction Period Is Clearly Erroneous, Arbitrary And Capricious	7
B. Disparate Treatment Of Similarly-Situated Applicants Constitutes Precisely The Type Of Agency Action Prohibited By the APA	10
IV. Failure To Grant Stay Would Irreparably Harm The Roberts Licensees	12
V. The Issuance Of The Stay Will Not Substantially Harm Other Interested Parties	15
VI. Grant Of The Requested Stay Is In The Public Interest	16
VII. Conclusion	17

SUMMARY

On June 18, 1997, the Roberts Licensees filed with the Wireless Telecommunications Bureau ("WTB") both a Petition For Reconsideration and an Expedited Petition For Tolling of Construction Deadline relating to the WTB's May 20, 1997 Order denying rejustification of the Roberts Licensees previously-granted extended implementation authorization ("EIA"). The May 20 Order of denial left the Roberts Licensees with six (6) months (i.e., until November 20, 1997) to complete their EIA. Both pleadings remain pending with the WTB. In the meantime, the clock is running on the six-month period.

The Roberts Licensees, in their June 18, 1997 Petition For Reconsideration, have demonstrated that the Commission committed reversible error in denying the Roberts Licensees rejustification of their extended implementation authorization for a wide-area 800 MHz Specialized Mobile Radio System. Failure to toll the greatly-reduced six-month construction period, pending Commission action on the Petition For Reconsideration, would cause the Roberts Licensees irreparable harm. The tolling of the construction period will not substantially harm other interested parties. The public interest will be served by tolling the running of the six-month construction period.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Amendment of Part 90 of the
Commission's Rules to Facilitate
Future Development of SMR Systems
in the 800 MHz Frequency Band**

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

**Implementation of Sections 3(n) and 332
of the Communications Act
Regulatory Treatment of Mobile Services**

GN Docket No. 93-252

**Implementation of Section 309(j)
of the Communications Act --
Competitive Bidding**

PP Docket No. 93-253

To: The Commission

**EXPEDITED PETITION FOR TOLLING OF CONSTRUCTION
DEADLINE OF ROBERTS LICENSEES**

The Roberts Licensees,^{1/} acting through counsel and pursuant to Section 705 of the Administrative Procedure Act ("APA")^{2/} and Section 1.43 of the Commission's Rules,^{3/} hereby

^{1/} As listed by the Commission in the May 20 Order the Roberts Licensees consist of the following: Harrowby TV, Inc., USITV, Inc., MTI TV, Inc., Ooh Baby! Productions, Inc., Aschroft ITV, Inc., Italia TV, Inc., O'Neil TV, Inc., HGTV, Inc., SGTv, Inc., RMTV, Inc., JMTV, Inc., Joan Moore, Inc., Elizabeth Martone, Inc., Bill Roberts, Inc., Mary Francis Martone, Inc., Shelly Curttright, Inc., Maureen Widing, Inc., Dru Jenkinson, Inc., Joseph Martone, Inc., Jana Green, Inc., Kathy Recos, Inc., Jeff Roberts, Inc., Patricia Fleming, Inc., Tad Dobbs, Inc., Wes Dalton, Inc., Steve Dowdy, Inc., David X. Crossed, Inc., Scott Mayer, Inc., Hunter ITV, Inc., Tenth Street TV, Inc., BBTv, Inc., JBTv, Inc., Lynn Adams, Inc.

^{2/} 5 U.S.C. § 705.

^{3/} 47 C.F.R. § 1.43. See also 47 C.F.R. § 1.41.

request that the Commission toll the running of the November 20, 1997 construction deadline imposed on the Roberts Licensees by the Bureau's *Order in Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, 12 FCC Rcd ____ (Wireless Bur.) (DA 97-1059, released May 20, 1997).^{4/} The Roberts Licensees request that the Commission act on this tolling request expeditiously, by not later than September 1, 1997, because of the ongoing depletion of the greatly-reduced construction period imposed by the May 20 Order.

1. On June 18, 1997, the Roberts Licensees filed a similar Expedited Petition For Tolling of Construction Deadline, in conjunction with their Petition for Reconsideration. A copy of the Petition For Reconsideration is attached. Both Petitions remain pending and, although the WTB informally has indicated that it plans to act thereon by the end of September 1997, the Roberts Licensees cannot rely on such representations as an alternative to duly exhausting their administrative remedies. The fact is that, by inaction on the Expedited Petition For Tolling and underlying Petition For Reconsideration, the Commission may defeat the Roberts Licensees' appellate rights under Section 402 of the Act by allowing any unconstructed licenses automatically to expire.^{5/}

2. As set forth in the pending Petition for Reconsideration, without prior notice the Commission changed the standard for rejustification of extended implementation authority ("EIA") to construct a wide-area 800 MHz Specialized Mobile Radio ("SMR") system, to

^{4/} Hereinafter "May 20 Order".

^{5/} The May 20 Order was effective upon release, 47 C.F.R. §§ 1.4, 1.103, and stated that the Roberts Licensees' authorizations will automatically cancel if construction is not completed by November 20, 1997.

something other than the standards published in December 1995, in clear violation of established principles of administrative law. Moreover, the Commission's treatment of the Roberts Licensees under the May 20 Order constitutes arbitrary and capricious conduct. The Commission has treated the Roberts Licensees differently, without any rational explanation, from a nearly-identical EIA rejustification request in which it granted two additional years to construct. Tolling the construction deadline set by the May 20 Order while the Commission acts on the pending Petition for Reconsideration is necessary to preserve the stations.

I. The Commission's Standards For Grant Of A Stay Are Clear And Well Established And Compel A Tolling Of The Construction Period Pending Action On The Petition For Reconsideration.

3. A stay pending the outcome of another proceeding is appropriate when (1) the party seeking the stay is likely to prevail on the merits of its appeal (or upon later reconsideration of its case by the Commission); (2) the party seeking the stay will be irreparably injured without the stay; (3) the issuance of the stay will not substantially harm other interested parties; and (4) grant of the stay is in the public interest. Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958); see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); National Cable Television Ass'n v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973). This Commission adopted a similar test. LeFlore Broadcasting Co., Inc., 43 RR 2d 807 (1978); Pocahontas Cable TV, Inc., 64 FCC 2d 698 (1977); see also Magdalene Gunden Partnership, 3 FCC Rcd 488, 490 (¶ 10) (Rev. Bd. 1988) (subsequent history omitted). The Commission previously conceded that a petition for reconsideration of the denial of an extended construction period operates to toll the running of that construction period. PSWF Corp. v. F.C.C., 108 F.3d 354, 358 (D.C. Cir. 1997).

4. As will be demonstrated below, the law and the facts in the instant case demonstrate that the Roberts Licensees satisfy each of these four showings and are, therefore, entitled to a tolling of the six-month construction deadline imposed by the May 20 Order.

II. The Roberts Licensees Have Been Subjected To Shifting Standards On The Issue Of Their EIA.

5. The Roberts Licensees have faithfully and with attention to detail navigated through the Commission's difficult regulatory landscape for 800 MHz SMR license grants and construction requirements since 1993, at which time the Roberts Licensees first began the process of obtaining their 800 MHz SMR authorizations. The Roberts Licensees filed most of their applications in October and November of 1993. Nine months later, in August 1994, the large majority of these applications remained pending. When the Commission proposed the use of auctions to award wide-area licenses for 800 MHz SMR and barred any new applications, the Roberts Licensees, along with many other applicants, had the processing of their long-pending applications suspended.

6. On January 25, 1995 the Roberts Licensees filed a request for EIA under Section 90.629 of the Commission's Rules. The request was detailed and complete, and included a proposed construction schedule. It reflected a joint plan to develop their existing and expected licenses. The Roberts Licensees committed to construct and place in operation by December 31, 1996 the number of base stations necessary to use at least ten percent (10%) of the channels associated with the Roberts Licenses, including any that might be subsequently granted.

7. The Commission granted the EIA request on March 3, 1995, having "determined that there is sufficient justification to warrant extended implementation." At that time, the

Commission granted the Roberts Licensees 5 years to develop their proposed 800 MHz SMR system (*i.e.*, until March 3, 2000).

8. On October 31, 1995, the Commission announced that it had processed and granted a number of the pre-August 1994 applications.^{6/} However, some six months passed before the Commission began (in May and June of 1996) to actually issue licenses reflecting the grants. This delay and various reconsideration petitions created regulatory uncertainty as to the status of most of the Roberts Licensees' authorizations, as well as those of others. Moreover, it made it extremely difficult to firm up plans for financing and implementation of their EIA. As the result of a number of inquiries by similarly-affected applicants, the Commission was forced to give notice that the licenses were in effect and that the time for completion of construction was running. FCC Public Notice, "Wireless Telecommunications Bureau Provides Guidance to 800 MHz SMR Applicants Granted Authorizations on October 31, 1995", 11 FCC Rcd 5788 (1996). Despite these serious obstacles interposed by the Commission's own procedures, the Roberts Licensees continued to implement their combined business plan in light of their EIA grant, although that grant was now subject to the further uncertainty of "rejustification."

9. Rejustification was now necessary because in December of 1995, the Commission adopted a plan to auction 800 MHz SMR spectrum on a wide-area basis.^{7/} In doing so, to

^{6/} The Commission originally announced the grant of applications in March 1995. Public Notice, Mimeo 52823, released March 17, 1995. But the Commission was later forced to condition and recant those grants. In the Matter of Grant of Applications for 800 MHz SMR, Business, Industrial/Land Transport and General Category Channels Received Between November 8, 1993 and August 10, 1994, 10 FCC Rcd 6635 (1995).

^{7/} Amendment of Part of the Commission's Rules to Facilitate Future Development of the SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and
(con't....)

maximize the amount of spectrum available for competitive bidding, the Commission barred any future EIA requests, truncated the duration of all existing EIA plans and made all existing plans subject to rejustification. Id. In requiring rejustification of previously-approved EIAs, the Commission publicly put those who would seek to rejustify on notice of the standard that they would be required to meet. Id. Under that standard the key date for purposes of facilities construction was December 15, 1995. Id. As will be seen, however, in the May 20 Order the Commission in fact employed a different or additional standard.

10. The Roberts Licensees filed their rejustification on June 4, 1996, and supplemented it on June 12, 1996 as additional formatting requirements were announced. They sought an extension of two years from the date of a rejustification grant, the time which the Commission's now revised rules normally allowed.

11. The Roberts Licensees made a rejustification showing that complied with the standards set forth in the December 1995 Order. Additionally, they received explicit representations from the Bureau's Land Mobile Branch that their rejustification request had already been reviewed and deemed in compliance with the rejustification criteria. Nonetheless, the May 20 Order applied a different set of standards in acting on individual rejustification requests and denied the Roberts Licensees.^{2/}

^{2/}(....con't)

Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd. 1463, 1525 (¶ 111)(1995) ("December 1995 Order"); see FCC Public Notice, "Recommended Filing Format for 800 MHz SMR Licensees Rejustifying Need for Extended Implementation Authority", 11 FCC Rcd 6579 (1996).

^{3/} See Roberts Petition at Exhibit A.

III. The Roberts Licensees Have Demonstrated That They Will Succeed On The Merits Of Their Petition For Reconsideration.

12. The May 20 Order caused several injuries to the Roberts Licensees. In each instance, the Roberts Licensees have demonstrated the clear error of the Commission's actions with respect to the Roberts Licensees. First, the Commission imposed a new and different standard for evaluation of the EIA request than that published in the December 1995 Order. Second, the Commission treated the Roberts Licensees differently from other, similarly-situated licensees. As set forth in greater detail in the Roberts Petition, the Roberts Licensees have a substantial likelihood of prevailing on the merits of each of these points. The demonstrable errors by the Commission meet the first prong of the Virginia Petroleum Jobbers test.

A. Imposition Of Different Standards Without Prior Notice To Drastically Reduce The Roberts Licensees Construction Period Is Clearly Erroneous, Arbitrary And Capricious.

13. With respect to the notice of standards under which their EIA request would be evaluated, it is well established that if the Commission is going to hold applicants or licensees to a regulatory standard, it must inform them beforehand of the components of that standard. See Bamford v. F.C.C., 535 F.2d 78, 82 (D.C. Cir.), cert. denied, 429 U.S. 895 (1976) ("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected"). This is particularly the case where the Commission expects strict adherence to those standards. See Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985); see also, Radio Athens, Inc. (WATH) v. F.C.C., 401 F.2d 398, 404 (D.C. Cir. 1968).

14. Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a regulatory standard without first

providing adequate notice of the substance of the rule. Satellite Broadcasting Co., Inc. v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987). The Commission may not reject an application for failing to meet a standard of which the applicant was never previously notified. An agency commits reversible error when it penalizes an applicant based on standards of which the agency failed to provide notice. CHM Broadcasting Limited Partnership v. F.C.C., 24 F.3d 1453, 1457 (D.C. Cir. 1994); see Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1560 (D.C. Cir. 1987). The Commission committed reversible error by denying the Roberts Licensees a benefit for which they earlier had been found qualified, when the denial was based on standards of which the agency gave no notice.

15. The December 1995 Order set out in a detailed manner the criteria to be satisfied to merit rejustification of the EIA. 11 FCC Rcd at 1525 (§ 111). Among other things, these criteria required a certification that facilities due to be constructed by December 15, 1995 had been constructed. The Roberts Licensees were in compliance with that requirement. They had another year in which to complete their initial phase of construction. In addition, the Roberts Licensees met all other announced standards contained in the December 1995 Order.^{9/} See

^{9/} The December 1995 Order required "a licensee seeking to retain extended implementation authority must: (a) indicate the duration of its extended implementation period (including commencement and termination date); (b) provide a copy of its implementation plan, as originally submitted and approved by the Commission, and any Commission-approved modifications thereto; (c) demonstrate its compliance with Section 90.629 of our rules if authority was granted pursuant to that provision, including confirmation that it has filed annual certifications regarding fulfillment of its implementation plan; and (d) certify that all facilities covered by the extended implementation authority proposed to be constructed as of the adoption date of this *First Report and Order* are fully constructed and that service to subscribers has commenced as defined in the *CMRS Third Report and Order*."

Roberts Petition, at p. 12 (§ 16). The Roberts Licensees' rejustification met the December 1995 Order criteria. It should have been granted.

16. Neither the December 1995 Order nor Section 90.629 of the Rules gave any notice that some other construction requirement, and not the December 1995 Order benchmark, would be the yardstick for determining whether rejustification of the EIA should be granted. Yet the May 20 Order, without any notice, applied a different standard. See Roberts Petition, at p. 13 (§ 18).

17. The Commission itself has only recently reaffirmed the principle that holders of authorizations are entitled to prior notice of the scope and consequences of rules where failure to comply might result in the loss of valuable license privileges. Algreg Cellular Engineering, 12 FCC Rcd ____ (FCC 97-178, released June 3, 1997, p. 14 §§ 32-33). In Algreg, the Commission reversed the Review Board's revocation of authorizations for cellular RSA facilities because the applicable rule had not provided sufficient notice that its violation would subject the permittees to loss of their authorizations. Id. The Roberts Licensees find themselves in a situation comparable to that of the Algreg permittees. The Roberts Licensees confront the possible loss of privileges, in the form of time critical to the successful implementation of their EIA plan. This loss of privileges arises directly from the Commission's finding that the Roberts Licensees had not taken steps to order equipment and begin construction of the system. May 20 Order, at pp. 10-11 (§22). If the Commission had announced that it would assess EIA rejustification requests based on steps taken toward construction without regard to the requirements of each individual EIA plan, the Roberts Licensees could have demonstrated compliance or requested a

waiver of the standard for good cause. But the Commission did not provide actual notice of the standard under which the Robert Licensees' EIA would, in fact, be measured. See also Salzer v. F.C.C., supra. Under the Commission's own standards as recently set forth in Algreg, this bait and switch procedure is reversible error. As a result of the Bureau's error, there is a substantial likelihood of the grant of the Roberts Petition. Virginia Petroleum Jobbers, supra.

**B. Disparate Treatment Of Similarly-Situated Applicants
Constitutes Precisely The Type Of Agency Action Prohibited
By the APA.**

18. The Roberts Licensees have also demonstrated beyond peradventure that the Commission has subjected them to treatment different from that accorded other, similarly-situated licensees. The United States Court of Appeals for the D.C. Circuit specifically warned the Commission not to engage in such disparate treatment. In Green Country Mobilephone, Inc. v. F.C.C., 765 F.2d 235, 237 (D.C. Cir. 1985), the Court warned, "a 'sometime-yes, sometimes-no, sometimes-maybe policy ... cannot be squared with our obligations to preclude arbitrary and capricious management of [an agency's] mandate". See also McElroy Electronics Corp. v. F.C.C., 990 F.2d 1351, 1365 (D.C. Cir. 1993); Melody Music v. F.C.C., 345 F. 2d 730 (D.C. Cir. 1965). The decisions in the May 20 Order turned on whether licensees demonstrated initiation of construction as of the date on which the rejustification requests were filed, without regard to whether such construction might be required under a given licensee's original EIA and without regard to the December 1995 Order benchmark. Even applying this new standard, however, there is no discernible difference between the situations of the DCL Associates, Inc. ("DCL") and the Roberts Licensees.^{10/} Yet DCL's EIA rejustification

^{10/} DCL had completed construction of only one test site which itself was not a part of the EIA of DCL. DCL Rejustification, p. 5, Exhibit A.